PP

v.

LIM KIM TONG

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED JC
[CRIMINAL TRIAL NO: 45-01-2001 (4)]
6 MARCH 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Whether accused committed offence of trafficking in a dangerous drug - Drugs found in package carried by accused - Struggle between accused and arresting officer - Whether conduct led to irresistible conclusion he had a guilty mind - Absence of evidence from arresting officers - When more than one inference - Whether inference most favourable to accused should be adopted*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - Use of double presumptions under s. 37(d) and (da) - Whether accused must be found in possession of drugs - Whether possession can arise out of legal presumption - Possession encompasses element of physical control and knowledge - Whether knowledge may be proved by inferences from surrounding circumstances - Whether accused had knowledge - Whether invoking presumption under s. 37(d) may offend rule against double presumptions - Whether charge ought to be amended to one of possession under s. 12(2) - Dangerous Drugs Act 1952, ss. 37(d), (da)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 37(d) and 37(g) - Presumptions - Drugs found in room - Whether fact that accused in custody and control of room amounts to proof of possession - Whether drug must be found to have been concealed - Whether prima facie case of trafficking established - Presumption of knowledge under s. 37(g) - Whether presumption of trafficking under s.37(da) may be invoked upon presumption of knowledge under s. 37(g) - Rule against double presumptions*

On 17 November 1999, acting on information received, C/Insp. Charun Ai Been (PW3) and his team arrested the accused who had gotten out from a car with his left hand holding a package and was unlocking the front gate of a house. The accused had put up a struggle. The package was seized and subsequent chemical analysis showed that it contained 30.5g of monoacetylmorphines which formed the subject matter of the first charge. Using the keys seized from the padlock of the gate, PW3 entered the said house where in the second room PW3 found in a box a plastic packet containing 38.3g of monoacetylmorphine, which formed the subject matter of the second charge. The accused was the tenant of the said house. The accused was charged with trafficking in 30.5g of

monoacetylmorphines (the first charge) and 38.3 g of monoacetylmorphines (the second charge) under s. 39B(1)(a) of the Dangerous Drugs Act (the Act) and punishable under s. 39B(2) of the Act. He claimed trial to both the charges.

As for the first charge, the learned deputy argued that the accused had knowledge of the drugs he was carrying in the package and therefore the accused must be deemed to be trafficking in the said drugs under s. 37(da)(iii) of the Act. As for the second charge, it was submitted that by virtue of the presumptions in s. 37(b) and (g) of the Act the prosecution had proved possession and therefore the accused must be deemed to be trafficking in the said drugs under s. 37(da). Learned counsel for the accused contended that in respect of the first charge the prosecution had only proved that he had only custody and control of the package but not knowledge of the contents therein. Similarly, it was argued that in respect of the second charge, by reason of the fact that the accused was the tenant, showed that the accused had custody or control of the paper box (exh. P8A) but not knowledge of the drugs inside.

Held (convicting accused for offence of possession under s. 12(2) of Act):

(1) For the presumption of drug trafficking to come into play under the provisions of s. 37(da) of the Act, the accused must be found in possession of the drugs. Possession under the provision must be proved by convincing, credible and admissible evidence and cannot arise out of legal presumption. Possession encompasses the element of physical control as well as an element of knowledge. Knowledge constitutes an essential ingredient of possession under s. 37(da) of the Act. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. (paras 11 & 13)

(2) There is more than one way in which the evidence with regard to the accused putting up a struggle, at the time of his arrest can be viewed. In the absence of the evidence of the police officers who apprehended and arrested the accused, there is more than one inference, which can be reasonably drawn. Either the accused knew the package contained drugs in excess of the statutory minimum or that the accused was panicky or that he thought it contained some other contraband goods. Since there was no clear and convincing evidence, the inference most favourable to the accused must be adopted. (para 15)

(3) There was no factual matrix adduced by the prosecution in this case for the court to infer that the accused had knowledge of the drugs inside the package. In respect of the first charge, the prosecution had only proved that he had only custody and control of the package but not knowledge of the contents therein unless the prosecution invoked the presumption under s. 37(d) in which case it would offend the rule against double presumptions. In the circumstances the prosecution had failed to prove a *prima facie* case of trafficking against the accused in respect of the first charge. Therefore, the accused was guilty of an offence of possession of the drugs under s. 12(2) of the Act. The first charge was amended to one of possession. (paras 17 & 19)

(4) It is not permissible to invoke the presumption of trafficking under s. 37(da) of the Act upon the presumption of knowledge under s. 37(g). The rule against double presumptions does not allow this. (para 22)

(5) Before the presumption in para. (g) can be invoked the dangerous drug must be found to have been concealed in the premises. The drugs here could not be said to have been concealed within the meaning of s. 37(g) and in consequence the presumption of knowledge could not be invoked. The prosecution had failed to establish a *prima facie* case of trafficking against the accused in respect of the second charge. Nonetheless, the prosecution had successfully established with the aid of the statutory presumption under s. 37(d), a *prima facie* case for an offence under s. 12(2) of the Act for being in possession of the drugs. Accordingly, the second charge was amended to one of possession. (paras 23, 27 & 30)

[6] Considering the circumstances, the accused in sentenced to 13 years' in prisonment and 10 strokes of the rotan in respect of each of the amended charges. (para 34)

Case(s) referred to:
Arumugam Periasamy v. PP [2005] 3 CLJ 685 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] MLJ 237 ***(refd)***
Leow Nghee Lim v. R [1956] MLJ 28 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Tai Chai Keh v. PP [1948-49] MLJ Supp 105 ***(refd)***
Toh Su Kuan v. PP [2005] 3 CLJ 740 CA ***(refd)***
PP v. Ahmad Puteh & Ors [1987] 1 CLJ 488; [1987] CLJ (Rep) 853 HC ***(refd)***
PP v. Chia Leong Foo [2000] 6 MLJ 705 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

A *PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC* ***(refd)***
Rex v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(1), 158
B Dangerous Drugs Act 1952, ss. 2, 12(2), 29B(1)(a), (2), 37(b), (d), (da)(iii), (g), 39A(2), 39B(1)(a), (2)
Evidence Act 1950, s. 27

For the accused - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Mohd Nordin Ismail; DPP

C
Reported by Amutha Suppayah

JUDGMENT

D **Azahar Mohamed JC:**

[1] The accused, Lim Kim Tong was charged with trafficking in 30.5g of monoacetylmorphines (the first charge) and 38.3g of monoacetylmorphines (the second charge) under s. 39B(1)(a) of the Dangerous Drugs Act (the act) and punishable under s. 39B(2) of the
E act. He claimed trial to both the charges. The charges read as follows:

First Charge

Bahawa kamu pada 17 November 1999, jam lebih kurang 10.30 malam, di hadapan rumah No. 4, Jalan Panglin 6, Taman Perling,
F dalam daerah Johor Bahru, dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya, iaitu 30.5 gram, monoacetylmorphines dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama

G **Second Charge**

Bahawa kamu pada 17 November 1999, jam lebih kruang 10.30 malam, didalam rumah No. 4, Jalan Panglin 6, Taman Perling, dalam daerah Johor Bahru, dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya, iaitu 38.3 gram, monoacetylmorphines dan oleh yang demikian kamu telah melakukan satu kesalahan di
H bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama

[2] The salient facts adduced by the prosecution can be summarized as follows. On 17 November 1999, acting on information received,
I C/Insp. Charun Ai Been (PW3) led a team of three other police personnel comprising of Det. Sjn. Major Huzaimi, Det. Cpl. Koomerdesan and Det. L/Cpl. Zulkifli Haron proceeded to the target

house, at no. 4, Jalan Panglin 6, Taman Perling, Johor Bahru. They arrived at the scene at about 9pm PW3 described that both the gates and grilles to the said house were locked. PW3 then instructed Det. Sjn. Major Huzaimi and Det. Cpl. Koomerdesan to take up position at the neighbouring house whilst he and Det. L/Cpl. Zulkifli Haron took position in the motorcar parked about 20 meters away from the target house. Subsequently, at about 10.30pm PW3 saw a Proton Wira motor car bearing registration no. JFM 3721 passed his observation point and stopped at the front gate of the said house. According to PW3, he saw a male person (subsequently identified as the accused) get out of the said motorcar from the driver's side with his left hand holding a package and proceeded to the locked gate. The accused then tried to open the locked gate. It was PW3's evidence that before the accused proceeded to the gate he had locked the said vehicle with his remote control. At the time when the accused was unlocking the gate he was still holding the package in his left hand. At that point of time PW3 contacted Det. Sjn Major Huzaimi *via* his handphone instructing him to apprehend the accused. Soon after, both Det. Sjn. Major Huzaimi and Det Cpl Koomerdesan arrested the accused. PW3 testified that he saw the accused putting up a struggle at the time of the arrest. When PW3 arrived, he identified himself to the accused and then seized the package from the left hand of the accused. Upon examination of the package (P6A) PW3 found inside it two newspapers packages and in each of these packages was a plastic package containing substances suspected to be heroin. The contents of the two plastic packets (exh. P6A(2) and P6A(5)) were subsequently sent to the chemist, Puan Suhana Ismail (PW1) for analysis and found to contain 30.5g of monoacetylmorphines which form the subject matter of the first charge.

[3] Using two keys from the set of five keys seized from the padlock of the gate, PW3 gained access in the said house. PW3 then made searches in the hall and from bedroom but nothing incriminating was found. A search was then made in the second room and PW3 found a paper box (exh. P8A), which was on the floor beside the wall of the said room. Beside P8A, PW3 also found one sealer (exh. P13B) and a weighing scale (exh. P13A). Exhibit P8A was closed at its top and when it was opened PW3 found two newspaper packages, each of which contained a plastic packet containing substances suspected to be heroin. According to PW1 these substances were found to have 38.3g of monoacetylmorphine, which form the subject matter of the second charge. PW4, Zainal Udin, the owner of the said house confirmed that the accused was the tenant of the said house at the material time.

[4] Since learned counsel for the accused in his submission had not raised any issue on the identity of the offending exhibit and the testimony of the chemist, I think it is not necessary for me to advert to that part of the evidence in detail. Suffice for me to say that PW1 had testified that she had thoroughly homogenized the substances in question. PW had conducted qualitative tests to determine the type of drugs contained in the substances. From the tests, she concluded that the substances contained monoacetlymorphines. With regard to the weight, PW1 proceeded with the quantitative tests to determine the percentage of monoacetlymorphines present in the substances. In my view, the evidence adduced by the prosecution had sufficiently established that for the purpose of analysis, sufficient samples were taken of the substances in question in order to establish that the drugs were monoacetlymorphines weighing 30.5g in relation to the first charge and 38.3g in relation to the second charge. PW6 had been a chemist with the Chemistry Department for many years. She possessed a B.Sc degree and had given expert evidence in court in numerous occasions. Her expert evidence had been accepted in other drugs cases. I accepted her findings with regard to the identification and method of analysis of the drugs. I was satisfied that the analysis was properly conducted by PW1 and cannot be faulted.

[5] In his submission at the close of the case for the prosecution, learned counsel for the accused contended that the prosecution had failed to make out a *prima facie* case in respect of both the charges. It was submitted that in respect of the first charge where the drugs were inside the package (exh. P6A) held by the accused, at its highest, the prosecution had only proved that he had only custody and control of the package but not knowledge of the contents therein unless the prosecution invoked the presumption under s. 37(d) of the act. It was the argument of learned counsel that in the event the prosecution relied on the presumption then the first charge ought to be reduced to one of possession as it offended the rule against a presumption upon a presumption laid down in the decision in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC and followed by the Federal Court in *PP v. Tan Tatt Eek (and another appeals)* [2005] 4 CLJ 460. Similarly, it was argued that in respect of the second charge, by reason of the fact that the accused was the tenant, again at its highest, it showed that the accused had custody or control of the paper box (exh. P8A) in the second room but not knowledge of the drugs inside. It was the argument of learned counsel that there was no evidence, direct or circumstantial, that the accused knew of the drugs inside the box let alone knowledge of the nature of the drugs.

[6] On the other hand, it was the contention of the learned deputy that it respect of the first charge there was ample evidence that the accused was in possession of monoacetylmorphine, which exceeded 15g in weight. It was argued that the accused had knowledge of the drugs he was carrying in the package. As a result, it was argued by the learned deputy that the accused must be deemed to be trafficking in the said drugs under the provisions of s. 37(da)(iii) of the act, which read as follows:

> (da) any person who is found in possession of:
>
> (iii) 15 grammes or more in weight of monoacetylmorphines;

[7] In respect of the second charge, the learned deputy in the beginning submitted that by virtue of the presumptions in ss. 37(b) and (g) of the act the prosecution had proved possession and for that reason the accused must be deemed to be trafficking in the said drugs under the provisions of s. 37(da). He argued that as the accused was the tenant of the said house he had the care and management of it and as a result he was deemed to be the occupier of the same. It was said that the drugs were concealed inside the paper box. By reason thereof, argued the learned deputy, it should be presumed that the drugs were so concealed with the knowledge of the accused. In order to appreciate the contention of the learned deputy I think it useful I set out s. 37(b) and (g), which read as follows:

> (b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises;
>
> (g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises;

[8] It is pertinent to note that on the appointed day for further submission, the learned deputy advanced a new argument. He referred to s. 2 of the act in which the expression 'trafficking' has been defined as follows:

> ... includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

[9] The learned deputy emphasized that the expression included 'concealing'. As I understand him, it was his argument that the prosecution had proved trafficking for the reason that the accused was concealing the drugs in the present case.

[10] Section 180(1) of the Criminal Procedure Code (the CPC) says that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case. It is settled law that the court is required to undertake a maximum evaluation of the evidence adduced by the prosecution at that stage of the trial when deciding whether or not to call on the accused to enter upon his defence (see *Balachandran v. PP* [2005] 1 CLJ 85 FC).

[11] I now turn to consider the first charge. For the presumption of drug trafficking to come into play under the provisions of s. 37(da) of the act, the accused must be found in possession of the drugs. Possession under the provision must be proved by convincing, credible and admissible evidence and cannot arise out of legal presumption. What constitutes possession? I think a passage in the judgment of Thompson (as he then was) in the case of *Chan Pean Leon v. PP* [1956] MLJ 237 is particularly useful. This is what his lordship said at p. 237:

> To establish possession for the purposes of criminal law, two separate questions are involved. The first is whether the accused parly was in possession of the article in question and the second, by reason of the application of the maxim actus non facit reum nisi mens sit rea, is whether he had knowledge of the thing possessed.

[12] In *Leow Nghee Lim v. R* [1956] MLJ 28 Taylor said at p. 30:

> Probably the most helpful definition of possession is; 'the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the things admits, to the exclusion of other persons'. This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

[13] Possession therefore encompasses the element of physical control as well as an element of knowledge. Thus, knowledge constitutes an essential ingredient of possession under s. 37(da) of the act. Possession incorporates the element of knowledge and without knowledge there can never be possession under the act. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. A case where knowledge is proven by direct and by inference or circumstantial evidence is *Wong Nam Loi v. PP* [1998] 1 CLJ 37 CA where the Court of Appeal found that knowledge had been proven as a result of the combination of the following facts. Firstly, the accused never protested

to his innocence when the drugs were found. Secondly, that there was s. 27 of the Evidence Act information. And lastly, that the accused tried to bribe the police officers who arrested him.

[14] Turning to the facts of the case before me, there is the evidence of PW3 who saw the accused left the car with his left hand holding a package and proceeded to the locked gate. According to this police officer when the accused was unlocking the gate he was still holding the package in his left hand. When PW3 arrived at the spot where the accused was arrested by both Det. Sjn. Major Huzaimi and Det. Cpl. Koommerdesan, he seized the package from the left hand of the accused. PW3 is a credible witness. This public officer merely testified based on what he actually saw on that particular day He unmistakably saw the accused was holding in his left hand a package. I accepted the evidence of PW3 with regard to the manner and circumstances the package was seized from the left hand of the accused.

[15] Now, the critical issue is this. Whether the accused knew that inside the package he was holding were two plastic packets (exh. P6A2 and 5) containing the drugs in question. Is there factual matrix on which I can make an inference that the accused had knowledge of the drugs inside the package he was holding at the material time? In this regard, PW3 in his testimony said that he saw the accused putting up a struggle at the time of the arrest by both Det. Sjn. Major Huzaimi and Det. Cpl. Koomeredersan. However, these two police officers were not called to testify by the prosecution to give explanation about the struggle. To my mind, there is more than one way in which the evidence with regard to the accused putting up a struggle, at the time of his arrest can be viewed. In the absence of the evidence of the police officers that apprehended and arrested the accused there is more than one inference, which can be reasonably drawn. Why the incident happened is open to speculation. Either the accused knew the package contained drugs in excess of the statutory minimum or that the accused was panicky or that he thought it contained some other contraband goods. More significantly, the court cannot indulge in conjecture and speculation in drawing an inescapable inference from the set of facts in this case that the accused had knowledge of the drugs in the plastic packet. There is no clear and convincing evidence, which leave no other possible alternative inference, which can be reasonably drawn. In the circumstances the inference most favourable to the accused must be adopted. In *Tai Chai Keh v. PP* [1948-49] MLJ Supp 105 Spenser Wilkinson had this to say at p. 108:

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> Where there is more than one inference, which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

[16] It is true that one set of facts and surrounding circumstances differ from another but I think it is permissible and helpful to refer to other
B cases on the issue of knowledge as guidance. In *Toh Su Kuan v. PP* [2005] 3 CLJ 740 CA the drugs were not only concealed in the shoes of the accused but to different parts of his body. The Court of Appeal held that the knowledge of the accused of the nature of the drugs was not proven. The facts in *PP v. Tan Tatt Eek* [2005] 4 CLJ 460 FC
C disclosed that the accused was arrested when he was carrying in his hand a plastic bag containing the drugs. The significance of the case is that at the time of his arrest the accused dropped the bag. The issue in that case was whether the accused had knowledge of the drugs inside the plastic bag. The Federal Court held there was no factual matrix to
D infer that the accused had knowledge of the nature of the drugs inside the plastic bag. Nik Hashim speaking for the court said at p 465:

> The main issue in this case is whether on the facts the respondent had knowledge of the drugs in the plastic bag.
>
> E In our view, the Court of Appeal was right in holding that there was no factual matrix adduced by the prosecution to infer that the respondent had knowledge of the nature of the drugs in the bag. On the evidence, the learned trial judge erred in finding that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case. In this case, the respondent was seen
> F and found to be carrying the orange plastic bag in his right hand and having dropped the bag he reacted with shock when the police arrested him. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coining to the conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had
> G knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.
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> The factum of the respondent having dropped the bag and displayed reaction of shock can be facts upon which the prosecution can invite the trial court to infer guilt on part of the respondent over the
> H presence of the drugs in the bag. But such conduct is equally consistent with an innocent man who is in a state of pure panic react in that way (see *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 4 CLJ 1).

[17] With that I return to the instant case. In my judgment there is
I no factual matrix adduced by the prosecution in this case for the court to infer that the accused had knowledge of the drugs inside the package. In my view in respect of the first charge where the drugs were found

inside the package held by the accused, at its highest, the prosecution had only proved that he had only custody and control of the package but not knowledge of the contents therein unless the prosecution invoked the presumption under s. 37(d) in which case it would offend the rule against double presumptions. In the circumstances the prosecution had failed to prove a *prima facie* case of trafficking against the accused in respect of the first charge.

[18] Nonetheless, in the surrounding circumstances of this case, I was satisfied that the accused had physical custody and control of the package in question rendering the application of the presumption under s. 37(d), which provides:

> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

[19] In the result I found that a *prima facie* case of an offence of possession of the drugs under s. 12(2) of the act and punishable under s. 39A(2) of the act had been established against the accused. In this regard, s. 158 of the CPC provides:

> 158. (l) Any court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.
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> [Am. Act. A908]

[20] In view of that, pursuant to the provision I amended the first charge to one of possession as follows:

> Bahawa kamu pada 17 November 1999, jam lebih kurang 10.30 malam, di hadapan rumah No. 4, Jalan Penglin 6, Taman Perling, dalam daerah Johor Baharu, dalam Negeri Johor Darul Ta'zim, telah memiliki dadah berbahaya, iaitu 30.5 gram monocetylmorphines, yang mana kamu tidak diberi kuasa yang sah menurut undang-undang untuk memiliki dadah tersebut dan oleh yang demikian, kamu telah melakukan satu kesalahan di bavcah s. 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39A(2) Akta yang sama.

[21] I now turn to consider the second charge. It is not in dispute that after a search was made in the second room, PW3 found a paper box (exh. P8A), which was closed at its top. When it was opened PW3 found two newspaper packages, each of which contained a plastic packet containing substances suspected to be heroin. Now, at the material time

A the accused was the tenant of the said house. In my view, as a tenant, the accused had care or management of the house and he shall be deemed to be the occupier of the house by virtue of s. 37(b) of the act.

B **[22]** It is appropriate at this juncture to take a closer look at the learned deputy's arguments in relation to the second charge. To my mind there are several problems with these arguments. In the first place, the contention of the learned deputy offended the rule against double presumptions laid down in the case of *Muhammed Hassan v. PP (supra)*. There, the Federal Court held that the learned trial judge erred in law C in using the presumption of possession under s. 37(d) of the act to invoke the presumption of trafficking under s. 37(da) thereof. It is true in the case before me the prosecution relied on the presumption under s. 37(g) to prove that the accused was trafficking in the drugs under s. 37(da). Even though a different presumption contain in s. 37(g) was D invoked, the rule against double presumptions would nonetheless, in my view, still apply. That is why in my judgment it is not permissible to invoke the presumption of trafficking under s. 37(da) of the act upon the presumption of knowledge under s. 37(g). The rule against double presumptions does not allow this.

E **[23]** The second problem is this. The wordings of the provision are clear and unequivocal. It is clear that before the presumption in paragraph (g) can be invoked the dangerous drug must be found to have been concealed in the premises. The issue therefore is whether on the facts of the present case there was concealment of the dangerous drugs F in the house that was occupied by the accused. In this context the authority that I would like to cite is *Ahmad Puteh & Ors* [1987] 1 CLJ 488; [1987] CLJ (Rep) 853 HC where Lim Beng Choon said this at p. 492, and I respectfully agree with him:

> G The next presumption relied by the prosecution at the trial was Section 37(g). It is clear from the opening words of the section that the condition precedent to the application of the presumption is that a dangerous drug must be found to have been concealed in the premises. The learned DPP and the Counsel for the accused for the accused agreed with such proposition but the quarrel was whether on H the facts of this case, there was concealment of the dangerous drug in the premises in question. I was at one stage somewhat disturbed over this issue as the finding of the learned President on this issue was rather confusing. I was inclined to think that he might have misconstrued the scope of Section 37(g). I therefore; sought the assistance of the learned DPP and the Counsel to look for authorities, I which might help to clarify this issue. Hence 1 postponed the hearing to enable them to search for the relevant authorities. It is rather unfortunate that at the resumption of the hearing on 20th May 1986, neither the learned DPP nor Counsel for the accused could produce

any authority. Be that as it may the clue to the proper construction of Section 37(g) lies with the crucial word "concealed". As this word is not defined in the Dangerous Drugs Act 1952 and from the context of the said Section, the word is not used in any unusual sense, I am not inhibited from relying on the dictionary meaning to find a definition of that word – see the speech of Viscount Dilhorne in his judgment in *Cozen v. Brutus* [1973] AC 854 @ 865. The meaning of "conceal" as defined in the *Shorter Oxford Dictionary* is "to keep from the knowledge or observation of others" or "to put or keep out of sight or notice, to hide". Applying the dictionary meaning of the word "conceal" as used in Section 37(g), it is clear in my mind that in order to raise the presumption provided by that Section the prosecution must introduce some evidence of a secret disposition of a dangerous drug in the premises. In the instant case the drug was found no secreted in the house of the 1st respondent but in a bag which was left somewhere at the rear section of the house which could be seen by anyone entering into that section of the house. Moreover, anyone could gain access or use the rear section of the house. On the facts of this case could it be said that the dangerous drug in question was found concealed in the house? My answer to this question is in the negative. Indeed PW3 in his evidence admitted that the bag could be seen and was not found hidden at all ("Bag itu boleh dilihat dan tidak tersorok"). The surrounding circumstances therefore went some way towards rebutting the presumption of knowledge of concealment as provided in Section 37(g).

[24] In the case before me it is important to bear in mind that the drugs were found inside the paper box. The important point to note here is that the drugs were found not secreted in the room. The paper box in question was left somewhere on the floor beside the wall of the room. The paper box was placed openly in the said room. The paper box can be seen by PW4 when he entered that section of the house. The room was not locked at the material time. In the surrounding circumstances and on the facts of this case, I am convinced that the drugs could not be said to have been concealed in the premises within the meaning of s. 37(g) of the act.

[25] Thirdly, the evidence adduced by the prosecution was confined to the discovery of the drugs in the paper box. Apart from the fact that the accused was the occupier of the house, the prosecution did not seek to introduce other evidence beyond that. As a consequence, in my view the provisions of s. 2 of the act *do* not have application to the particular facts of this case. In *Arumugam Periasamy v. PP* [2005] 3 CLJ 685 CA Gopal Sri Ram observed at p 695:

Secondly, in any event, the evidence relied upon by the prosecution in the court below was confined to the discovery of the drugs in the carrier of the motorcycle. No evidence was led beyond that. Accordingly, we must not only hearken to the definition of trafficking

A under s. 2 but also to the operative words with which that section opens. It says "in this Act unless the context otherwise requires". These words mean that the words defined in s. 2 are to take effect and are to be applied accordingly to the factual context of each case. It the context does not admit the definition, then the words do not have application to the particular facts.

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[26] A further difficulty is this. It is settled law that the act that make up 'trafficking' as defined in s. 2 of the act, for example, concealing dangerous drugs involve the prerequisite element of possession. In this regard, I refer to *PP v. Chia Leong Foo* [2000] 6 MLJ 705 where C Augustine Paul (as he then was) said at pp 717-718:

> It must be observed that most of the acts that constitute 'trafficking' as defined in s. 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession unlike, for instance, the sale and D supply of dangerous drugs which need not necessarily involve possession as demonstrated by *Pendakwa Raya v. Mansor bin Mohd. Rashid & Anor* [1996] 3 MLJ 560. It follows that a person cannot keep, conceal store, transport or carry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them. Proof of further facts to establish any one of these acts is therefore sufficient E to make out a case of trafficking. Thus, it is true, as the (then) Supreme Court observed in *The Geok Hock v. PP* [1989] 3 MLJ 162 (at p 163), that '... the definition in the Act sounds artificial and not according to the ordinary meaning of the word "trafficking" which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implication'. The offence is therefore F complete upon proof of the relevant act that constitutes 'trafficking' as defined in s. 2 of the Act and the purpose of such act is not material. The weight of the dangerous drugs involved is not a determinative factor (see *Leong Siew Hoong v. PP* [1988] 1 MLJ 396). Personal consumption may be set up to explain the possession of the drugs (see *Cohen Lorraine Philis & Anor v PP* [1989] 3 MLJ 289; *Ng* G *Chai Kem v PP* [1994] 2 MLJ 210; *Chow Kok Keong v PP* [1998] 2 MLJ 337). However, as a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to *rebut it* (see *Ong Ah Chuan v. PP* [1981] 1 MLJ 64). Be that as it may, even though the H definition of 'trafficking' contemplates acts that go beyond mere or passive possession of dangerous drugs such possession can be presumed to amount to trafficking if the amount of drugs possessed exceed a certain amount in weight dependent on the nature of the drugs involved as provided by s. 37(da) of the Act. Event in the absence of this presumption where a person is caught with being in I possession of dangerous drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he intended to traffic in them would, in the absence of any plausible explanation

by him, be irresistible (see *Ong Ah Chuan*'s case). As most of the acts that constitute trafficking involve the prerequisite element of possession the initial matter that requires proof by the prosecution is possession.

[27] In the context of the present case, as I have said earlier, the drugs could not be said to have been concealed within the meaning of s. 37(g) and in consequence the presumption of knowledge cannot be invoked. On the facts of this case there is no direct evidence or threads of circumstantial evidence of knowledge on the part of the accused of the nature of the drugs inside the paper box found in the room. Without knowledge there cannot be possession. For this reason, possession had not been proved by the prosecution and it follows the accused cannot be said to conceal the drugs within the meaning of 'trafficking' in the act.

[28] And that brings me to the last point regarding the s. 2 of the act argument advanced by the learned deputy. As I have pointed out earlier the learned deputy in the beginning submitted that by virtue of the presumptions in s. 37(b) and (g) of the act the prosecution had proved possession and for that reason the accused must be deemed to be trafficking in the said drugs under the provisions of s. 37(da). On another day, he advanced a new argument, that is to say, the s. 2 of the act point. In reflecting over this stand taken by the learned deputy, I recall the words of the learned judge in *Arumugam Perisamy v. PP (supra)* at p 695:

The learned deputy also referred us to s. 2 of the Act in which the expression "trafficking" has been defined. That expression, according to its definition, includes "transporting". The learned deputy's argument is that the appellant was transporting the proscribed drugs in the present case and therefore comes within the definition. With respect, we do not agree. In the first place, the prosecution's case in the court below was never proceeded with or argued on the footing that the appellant was guilty because he was "transporting" the drugs in question. It will, therefore, be a procedural injustice, and even perhaps a substantial injustice to permit them to change rack and plead a different case before us.

[29] Further on this issue, I consider it necessary and useful to reproduce the guidance as set out by the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC at p 219:

In our view, the problem is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking'or if it intends to rely on a presumption to establish trafficking and, if the latter be the case, to identify the precise presumption. This could be done either before the commencement of the trial or as part of the opening speech and would go a long way in assisting the defence in directing its cross examination

A along appropriate lines and thereby avoiding a waste of the court's time. See, *PP v. Chia Leong Foo* [2000] 6 MLJ 705, applying *PP v Okonkwo & Anor* [1993] 3 SLR 610.

[30] For the reasons aforesaid I found that the prosecution had failed to establish a *prima facie* case of trafficking against the accused in B respect of the second charge. Nonetheless, on the totality of the evidence I found that the accused had in his custody and under his control the paper box containing the drugs in question. Consequently, the prosecution had successfully established with the aid of the statutory presumption under s. 37(d), a *prima facie* case for an offence under C s. 12(2) of the act for being in possession of the drugs and was liable to be punished under s. 39A(2) of the same act. Accordingly, I amended the second charge to one of possession as follows:

> Bahawa kamu pada 17 November 1999, jam lebih kurang 10.30 malam, di dalam rumah No. 4, Jalan Penglin 6, Taman Perling, dalam D daerah Johor Baharu, dalam Negeri Johor Darul Ta'zim, telah memiliki dadah berbahaya, iaitu 38.3 gram monoacetylmorphines, yang mana kamu tidak diberi kuasa yang sah menurut undang-undang untuk memiliki dadah tersebut dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39A(2) Akta yang sama.

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[31] Continuing with the sequence of events in the proceedings before me, the two amended charges were both read and explained to the accused. The accused pleaded guilty to both the amended charges. I then found the accused guilty of both the amended charges. The learned F counsel on behalf of the accused advanced his plea in mitigation. He informed the court that the accused had no previous conviction and that he had repented. Learned counsel further prayed for leniency. The learned deputy urged this court to take a serious view of the drug menace. He said that public interest could be served effectively with an G appropriate sentence.

[32] Unquestionably, drug menace is a very grave problem. In this regard I refer to *PP v. Loo Choon Fatt* [1976] 2 MLJ 256. The following passages in the judgment Hashim Yeop Sani (as he then was) at p 257 of the report is of relevance:

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> In respect of offence under the Dangerous Drugs Ordinance, 1952 there has been a gradual change in the attitude of the legislature during the last few years. The Ordinance has been amended by Parliament a number of times, in 1971 (by Act A112 of 1972) then in 1973 (by Act A 194 of 1973) and then in 1975 (by Act A293 of 1975). At the I moment there is yet another amendment which is awaiting the Royal Assent. In the legislative exercise in 1973 penalties attached to the various offences under the law were enhanced. For the offence of possession of any dangerous drugs under section 12(2) of the

Ordinance, for example, the penalty was increased from a maximum of $ 10,000 fine to a maximum of $20,000 fine and the maximum imprisonment was increased from three years to five years. In the legislative exercise in 1975, among other things, a new provision (new section 39A) was inserted whereby it is provided that whoever is convicted of an offence under the Ordinance and the subject matter of which is heroin or morphine of five grams or more in weight shall be liable to imprisonment (with no option of a fine) for a term not exceeding fourteen years and not less than three years and he shall also be liable to whipping of not less than six strokes. According to the Bill which is at the moment awaiting the Royal Assent another new provision is inserted creating a new offence of planting or cultivating any plant from which raw opium, coca leaves, poppy-straw or cannabis may be obtained. The punishment for the new offence is life imprisonment and whipping.

It is common sense to say that behind these legislative exercises was the government's realization *albeit* gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect, the public policy. It must be presumed that behind the public policy is the consideration of public interest.

The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

[33] Above all, in assessing the appropriate sentence to be passed on the accused, I had carefully considered the element of public interest as encapsulated in *Rex v. Kenneth John Ball* [1951] 35 Cr App R 164:

In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest lift. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore,

A fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe

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[34] I had taken into account the mitigating factors advanced by learned counsel on behalf of the accused. At the same time I had given due weight to the fact that the accused had committed a most serious crime. In the circumstances, I convicted the accused and passed a C sentence of 13 years imprisonment with effect from the date of arrest and ten strokes of the rotan in respect of each of the amended charges. I further ordered that the imprisonment sentences are to run concurrently.

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